

1993

# The State of Utah v. Nuel L. Harris : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :  
Plaintiff/Appellee, :  
v. : Case No. 930034-CA  
NUEL L. HARRIS, : Priority No. 2  
Defendant/Appellant.:

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BRIEF OF APPELLEE  
- - - - -

APPEAL FROM A CONVICTION FOR AGGRAVATED  
ASSAULT, A THIRD DEGREE FELONY, IN VIOLATION  
OF UTAH CODE ANN. § 76-5-103 (1990), AND  
ATTEMPTED ROBBERY, A THIRD DEGREE FELONY, IN  
VIOLATION OF UTAH CODE ANN. §§ 76-4-101, 76-4-  
102 AND 76-6-301 (1990), IN THE THIRD JUDICIAL  
DISTRICT COURT IN AND FOR SALT LAKE COUNTY,  
UTAH, THE HONORABLE ANNE M. STIRBA, PRESIDING.

APPEALS

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BRIEF OF APPELLEE

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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction for aggravated assault, a third degree felony, in violation of Utah Code Ann. § 76-5-103 (1990), and attempted robbery, a third degree felony, in violation of Utah Code Ann. § 76-4-101, 76-4-102, and 76-6-301 (1990). This Court has jurisdiction over the appeal pursuant to Utah Code Ann. § 78-2a-3(2)(f) (1992).

STATEMENT OF THE ISSUES ON APPEAL AND

STANDARD OF APPELLATE REVIEW

Did the trial court commit reversible error by considering uncharged criminal conduct contained in defendant's presentence report when sentencing defendant pursuant to a plea bargain agreement?

"'This Court does not disturb a sentence unless it exceeds that prescribed by law or unless the trial court has abused its discretion.' State v. Shelby, 728 P.2d 987, 988 (Utah 1986); State v. Gerrard, 584 P.2d 885, 887-88 (Utah 1978). An abuse of discretion may be manifest if the actions of the judge were

'inherently unfair' or if the judge imposed a 'clearly excessive' sentence. State v. Gerrard, 584 P.2d at 887." State v. Strunk, 205 Utah Adv. Rep. 14, 17-18 (Utah 1993) (Hall C.J., dissenting).

#### CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

This case may be disposed of solely on the basis of caselaw.

#### STATEMENT OF THE CASE

In August of 1992, defendant and three other individuals were charged with aggravated sexual assault, forcible sodomy, and aggravated robbery (R. 06-08). Defendant waived his preliminary hearing and was bound over to district court, where he entered a plea of not guilty (R. 03, 16-17). On November 30th, after the trial court granted defendant's motion to withdraw his plea of not guilty, defendant entered a guilty plea to one count of aggravated assault and one count of attempted robbery (R. 26-27). On December 28th, defendant was sentenced to two consecutive zero to five year terms at the Utah State Prison (R. 36-37). He then filed a timely appeal (R. 39).

#### STATEMENT OF THE FACTS

The underlying factual scenario in this case involved four men, all transients, who forcibly sexually assaulted and robbed a woman, also a transient, at a motel in Salt Lake County (R. 74-76). All four men originally were charged with aggravated sexual assault, forcible sodomy, and aggravated robbery (R. 06-07). In defendant's case, the charges were reduced to one count each of aggravated assault and attempted robbery, in exchange for his plea of guilty (R. 26-27). The trial court then sentenced defendant to

two consecutive zero to five year terms in the Utah State Prison (R. 36-37).

#### SUMMARY OF ARGUMENT

The State concedes that the trial court, in sentencing defendant, improperly considered the criminal charges that had been dismissed as a result of defendant's plea bargain with the State. However, because the court's sentence fell within the limits of what was permissible for the crimes that were actually charged and because the court stated sufficient and appropriate reasons, totally apart from the improper considerations, for the sentence it imposed, the sentence should be upheld.

#### ARGUMENT

##### POINT ONE

IN SENTENCING DEFENDANT, THE TRIAL COURT IMPROPERLY CONSIDERED CRIMINAL CHARGES WHICH HAD BEEN DISMISSED AS A RESULT OF DEFENDANT'S PLEA BARGAIN WITH THE STATE.

The State concedes that, in sentencing defendant, the trial court erred in considering the unproven charges which had been dismissed as a result of defendant's plea bargain with the State. Defendant's plea only admitted the facts constituting the lesser crime, as stated in the plea agreement. His plea "does not presuppose the truth of the facts pleaded in the [information]." People v. Griffin, 166 N.E.2d 684, 199 N.Y.S.2d 674, 7 N.Y.2d 511, 515-16 (1960).

When defendant entered the plea to the lesser charges of aggravated assault and attempted robbery, he did so in exchange for giving up his right to have a jury determine his guilt or innocence



on the original charges of aggravated sexual assault, forcible sodomy, and aggravated robbery. In essence, he gave up that right only on the condition that the original charges be dismissed. See State v. Womack, 319 N.W.2d 17 (Minn. 1982). Dismissal of criminal charges as part of a plea bargain is the functional equivalent of acquittal of the charges, which would preclude consideration of their underlying facts for the purpose of imposing sentence to the reduced charges. People v. Griffin, 7 N.Y.2d at 515. Accord People v. Harvey, 25 Cal.3d 754, 758, 159 Cal. Rptr. 696, 699 (1979).

Utah has dealt directly with this issue only in the context of a capital case, where the supreme court held "that the sentencing body -- be it judge or jury -- may not rely on other violent criminal activity as an aggravating factor supporting a death penalty unless it is first convinced beyond a reasonable doubt that the accused did commit the other crime." State v. Lafferty, 749 P.2d 1239, 1260 (Utah 1988). The rationale underlying this rule is that reliance on criminal conduct not resulting in a conviction could be unfairly prejudicial to a defendant because such reliance could tip the scales to a sentence of death when the defendant had never actually been proven to have committed the alleged crime. Id. at 1259. An analogous rationale, it would seem, applies to the instant case. If the court's sentencing decision rests on the unproven charges as stated in the information, defendant could well be unfairly prejudiced by receiving a punishment for an unproven and unadmitted crime. See State v. Womack, 319 N.W.2d at 19-20.

Considering such conduct in a sentencing decision is, therefore, improper.

Defendant also argues that the trial court, in sentencing defendant, improperly relied on the victim's identification of him, which was apparently reported for the first time in the presentence report (Br. of App. at 6). He argues that this identification is contrary to the victim's failure to identify him in an earlier lineup. However, given defendant's plea, which specifically admits that he assaulted the victim on a specific date at a specific place, with intent to cause her serious bodily injury, it is difficult to surmise why the court's reference to the identification mentioned in the presentence report is problematic.

#### POINT TWO

BECAUSE THE COURT'S SENTENCE FELL WITHIN THE BOUNDS OF APPROPRIATENESS FOR THE CHARGED CRIMES AND BECAUSE THE COURT STATED OTHER SUFFICIENT AND APPROPRIATE REASONS TO SUPPORT THE SENTENCE IMPOSED, THE SENTENCE SHOULD BE UPHELD.

The court's four-page sentencing ruling contains three references to the sexual offenses with which defendant was originally charged. See addendum a. First, the court stated:

What happened in this case is that the victim in this case, who was also transient, was brutally and viciously attacked. And the facts are that Jamie Barnhart, your co-defendant, and you approached the victim. She held her. And this victim claims to have been multiply raped anally, vaginally and sodomized. That this woman was beaten about her face, and then she was left.

(R. 84-85).

In the second instance, the court stated:

There are some inconsistencies in the statements of the defendant. There is not inconsistency in the fact that she was viciously and brutally beaten about her face and there was also evidence of her having been sexually assaulted.

(R. 85).

And, finally, the court stated:

The offense was characterized by extreme cruelty or depravity. And I think holding someone down and multiply beating her or raping her, and that certainly falls in that category, and there are multiple charges here, and the defendant's attitude is not conducive to supervise [sic] in a less restrictive setting, I certainly agree with those aggravating circumstances in this case and feel that incarceration in the Utah State Prison is warranted and required under the circumstances.

(R. 86).

In the first instance, the court used the equivocal phrase, "this victim claims." In the second, the court stated, "there was also evidence." In the final instance, the court used the alternative "beating her or raping her" (emphasis added). In all three instances, the references to the sexual conduct could be omitted entirely and the reasonableness of the remaining part of the ruling would still be manifest.

Absent these references or even if the court improperly considered this information, the court's ruling contains sufficient and appropriate reasons to sustain the sentence imposed. See State v. Lovell, 758 P.2d 909, 912-13 (Utah 1988) (either one or two aggravating circumstances found by court were sufficient to support the sentence imposed); State v. Robison, 811 P.2d 500, 504 (Idaho

App. 1991) (even if court improperly considered certain information, court **stated** other sufficient reasons to support sentence imposed). The crux of the court's ruling revolves around the "cruel", "vicious," and "brutal" beating that the victim sustained, evidenced by her "unusually extensive" injuries. Furthermore, after holding down and then severely beating her, defendant and his associates simply abandoned the victim (R. 85). **Additionally**, the court noted that "Mr. Harris had in his possession property belonging to the victim of the assault" (R. 86).

Furthermore, after having pled guilty to the lesser charges, defendant, when given the opportunity to make a statement at the sentencing hearing, in essence denied his responsibility for the charges to which he had pled. This prompted the court to observe that defendant's posture "[did] not serve [him] well at this time" and later to conclude that "defendant's attitude is not conducive to supervise in a less restrictive setting" (R. 81-83, 84, 86).

In sentencing defendant, the court relied primarily on the vicious nature of the beating that the victim sustained as well as on the defendant's failure to accept responsibility for the offenses. The court sentenced defendant pursuant to the recommendation of Adult Probation and Parole and within the terms prescribed by law (R. 86-87). Under the circumstances, the court did not abuse its discretion, and its sentence should be affirmed.

CONCLUSION

For the reasons stated, this Court should affirm defendant's sentence.

RESPECTFULLY submitted this 18<sup>th</sup> day of June, 1993.

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Attorney General

*Joanne C. Slotnik*

JOANNE C. SLOTNIK  
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing brief of Appellee were mailed, postage prepaid, to Ronald S. Fujino and Charles F. Loyd, Jr., Attorneys for Defendant, 424 East 500 South, Salt Lake City, Utah 84111, this 18<sup>th</sup> day of June, 1993.

*Joanne C. Slotnik*

## ADDENDA

## ADDENDUM A

1 face value.

2 MR. LOYD: And the Court will recall that that's  
3 also contained in the Defendant's Certificate and Statement  
4 and was part of the plea bargain.

5 THE COURT: Is there any legal reason why sentence  
6 cannot be imposed at this time?

7 MR. LOYD: No, your Honor.

8 THE COURT: Mr. Harris, you have been found guilty  
9 of one Count of Aggravated Assault, a Third Degree Felony,  
10 and one Count of Atttempted Robbery, a Third Degree Felony.  
11 I have listened to what you said and the comments of your  
12 counsel.

13 I'd first note, Mr. Harris, at the time that you  
14 entered your plea to both of those Counts I went over with  
15 you in great detail whether you were, in fact, guilty of  
16 those offenses. I think at this point to come into this  
17 Court at the time of sentencing and deny responsibility for  
18 the offenses you have admitted to does not serve you well at  
19 this time.

20 What happened in this case is that the victim in  
21 this case, who was also transient, was brutally and viciously  
22 attacked. And the facts are that Jamie Barnhart, your  
23 co-defendant, and you approached this victim. She held her.  
24 And this victim claims to have been multiply raped anally,  
25 vaginally and sodomized. That this woman was beaten about



1 her face, and then she was left. And she identified you,  
2 Mr. Harris, as well as Miss Barnhart and also the other  
3 co-defendants, one of whom was prepared to testify against  
4 you and the other co-defendants.

5 Also, the facts in this case as alleged by the  
6 victim are that before the preliminary hearing -- and I hear  
7 what you say, Mr. Loyd that someone approached her and said  
8 that Red Bone says, If you don't go to court and testify,  
9 everything will be forgotten; if you do you'll get hurt.  
10 Then she indicated that she was going to have to testify and  
11 she was attacked and her leg was broken.

12 That's what the victim alleges in this case. I  
13 understand that you deny it.

14 And I accept what you say, Mr. Loyd. And I am  
15 going to, in the sentence the Court imposes, consider that  
16 and weigh that very heavily. That that's contrary to what  
17 she represented to you when you interviewed her.

18 There are some inconsistencies in the statements  
19 of the defendant. There is no inconsistency in the fact that  
20 she was viciously and brutally beaten about her face and  
21 there was also evidence of her having been sexually  
22 assaulted. ✓

23 The recommendation of Adult Probation & Parole --  
24 first of all, based upon your criminal history -- and  
25 sometimes I really don't understand how such a vicious crime

1 could come out with a recommendation for probation. But in  
2 any event, there is a recommendation by Adult Probation &  
3 Parole that the Court depart upward from the guidelines for  
4 the reasons that in their judgment Mr. Harris represents a  
5 serious threat of violent behavior, that the victim in this  
6 case was particularly vulnerable, that the injury to the  
7 person was unusually extensive. And I might add, also  
8 Mr. Harris had in his possession property belonging to the  
9 victim of the assault.

10 The offense was characterized by extreme cruelty  
11 or depravity. And I think holding someone down and multiply  
12 beating her or raping her, and that certainly falls in that  
13 category, and there are multiple charges here, and the  
14 defendant's attitude is not conducive to supervise in a less  
15 restrictive setting, I certainly agree with those aggravating  
16 circumstances in this case and feel that incarceration in the  
17 Utah State Prison is warranted and required under the  
18 circumstances.

19 Well, having said that, it is the judgment and  
20 sentence of this Court, Mr. Harris, that you be sentenced to  
21 the terms prescribed by law for each of these offenses,  
22 namely: zero to five years in the Utah State Prison for each  
23 offense. Also, I am aware that you don't have substantial  
24 funds available to you by any means in light of your  
25 lifestyle. And the fine, although clearly a greater fine

1     could be justified in this case, I don't think that one would  
2     make any sense because I don't think you have the ability to  
3     pay a greater fine. The Court orders that you pay a fine in  
4     the amount of \$1,000 plus an 85 percent surcharge. That is  
5     consistent with the recommendation of Adult Probation &  
6     Parole.

7                 With regard to whether you should be -- whether  
8     these sentences should be consecutive or concurrent, first of  
9     all I'd make a note that I don't think a 90-day diagnostic  
10    evaluation would serve any useful purpose in this case. And  
11    I very often consider that if the Court is willing to place  
12    someone on probation, and I do not feel that is warranted in  
13    this case. And I think that incarceration at the Utah State  
14    Prison is appropriate punishment, Mr. Harris.

15                I think that this was a particularly vicious crime  
16    against someone who was very vulnerable. Multiple people  
17    attacking one person makes that victim even more vulnerable  
18    than usual. It seems to me, Mr. Harris, that the  
19    recommendation of Adult Probation & Parole is appropriate.  
20    And therefore, I am following that recommendation and  
21    sentencing you consecutively to the Utah State Prison.

22                I am also going to order that you pay -- be  
23    jointly and severally responsible for victim restitution for  
24    the injuries that she claims to have suffered. That is the  
25    judgment and sentence of the Court.